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ALEXANDER L. STEVAS,
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No. 80-1767

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STEVIE STUMBO - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is it a denial of a criminal defendant's fourteenth amendment right to due process of law for a state court to permit private counsel, retained by one desirous of a conviction, to assist the Commonwealth Attorney in the conduct of the prosecution?

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v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Kentucky is unreported and is set out in the Petitioner's Appendix.

OBJECTION TO JURISDICTION

Respondent submits that the judgment rendered by the .Supreme Court of Kentucky is based solely on state or nonfederal grounds that are adequate to support that judgment. *Stumbo* v. *Commonwealth,* Memorandum Opinion at 3-4. [Hereinafter *Stumbo*]. For this reason this respondent objects to this Court's jurisdiction of this matter. See *Wood* v. *Chesborough,* 228 U. S. 672 (1913).

STATEMENT OF THE CASE

I. Nature of the Case

This is an application for Writ of Certiorari to the Supreme Court of Kentucky wherein that court denied petitioner's Petition for Rehearing of the decision of that court.

II. Course of the Proceedings

On August 17, 1979, the Floyd County Grand Jury returned an indictment charging the appellant, Stevie Stumbo, with murder. (Transcript of Record, hereinafter, TR, p. 1).

On March 25, 1980, a pretrial conference on the motion to recuse the retained counsel was heard and overruled. (Transcript of Evidence, hereinafter TE, p. 3). After the ruling on this and other motions the trial began on April 2, 1980. (TE, p. 22). On April 4, 1980, the jury after deliberations returned a verdict finding the appellant guilty. (TE, p. 400; TR, p. 45). The jury recommended the minimum sentence of twenty (20) years. (TR, pp. 45-47). Final judgment was entered on April 8, 1980. (TR, p. 57).

The petitioner appealed the judgment of the Floyd Circuit Court to the Kentucky Supreme Court. The Supreme Court of Kentucky affirmed the decision of the court below on December 16, 1980. The petitioner filed a Petition for Rehearing with the Supreme Court of Kentucky which was denied on February 17, 1981.

III. Decision of the Court

In its opinion rendered December 16, 1980 the Supreme Court of Kentucky ruled as follows:

> "On this appeal, appellant contends it was prejudicial error for the trial court to permit the Honorable Lester Burns, private counsel retained by Larry Johnson's mother, to assist the Commonwealth Attorney in prosecuting the case. This contention is without merit . . .
>
> It has long been the law in this jurisdiction that private counsel retained by persons desirous of a conviction are permitted to assist the commonwealth's attorney in the conduct of the prosecution. *Benningfield* v. *Commonwealth,* Ky., 17 S.W. 271 (1891); *Adams* v. *Commonwealth,* Ky., 111 S.W. 348 (1908); *Tackett* v. *Commonwealth,* Ky., 12 S.W. 2d 289 (1928). Because the entire prosecution of the case was not turned over to private counsel, and the commonwealth's attorney was present in the courtroom during trial, we find no error in the trial court's allowing Mr. Burns to assist the commonwealth's attorney in the conduct of the prosecution of the case. See, 63 Am. Jur. 2d, Prosecuting Attorneys, Sec. 9.
>
> Appellant Stumbo's next contention is that the conduct and remarks of Mr. Burns during both cross-examination and closing argument were prejudicial to him and were calculated to inflame the jury. . . . After considering this issue against the background of the entire case, we conclude that the misconduct in question did not produce that level of prejudice to the appellant which requires

reversal. Cf., *Hunt* v. *Commonwealth,* Ky., 466 S.W. 2d 957 (1971); *Richards* v. *Commonwealth,* Ky., 517 S.W. 2d 237 (1974); *Vontrees* v. *Commonwealth,* 291 Ky. 583, 165 S.W. 2d 145 (1942)." *Stumbo* at 2-6.

IV. Facts

In the beginning of trial, evidence regarding Mr. Burns and Mr. Scalf being retained as special prosecutors by the victim's family with the Commonwealth Attorney's approval was heard. (TE, p. 23). Mr. Burns was called first and testified that he was hired by the decedent's family to assist in the prosecution of Steve Stumbo subject to the Commonwealth Attorney's approval. (TE, pp. 23-24). It was then related that Commonwealth Attorney Allen had no objection to the assistance but demanded that prosecution of the case proceed according to law and in an order that justice to be done for all parties. (TE, p. 24). To this Mr. Burns, being an ex-Commonwealth Attorney himself, agreed to meet such a responsibility. (TE, p. 24). Mr. Burns subject to this agreement related to Mrs. Goldie Johnson, who retained him, that he would accept the employment subject to trying the case in accordance with the law and facts of the case. (TE, p. 25).

Mrs. Goldie Johnson was the second witness. (TE, p. 26). She testified that Mr. Burns was hired because she understood him better than the other attorneys. (TE, p. 27). However, she then stated that she had no conversations with Mr. Burns regarding his duty to prosecute or his discussion(s) with Mr. Allen. (TE,

p. 28). On cross-examination she testified that she understood Mr. Burns had to receive Mr. Allen's approval to assist the prosecution. (TE, p. 30). She also stated that no promises were made other than that the prosecution would see that justice be done. (TE, p. 31).

Mr. Gary Johnson, trial counsel for the defendant, was the next witness. (TE, p. 32). He testified that in his prior conversation with the prosecution, Mr. Allen expressed his reservations concerning Mr. Burns participation. He continued stating that in his previous experiences as an attorney he found that there was a strong policy against private counsel being retained to prosecute a case. (TE, p. 32).

Mr. Allen was the final witness. (TE, p. 33). He testified that the reasons he allowed the special prosecutor was that he was a lifetime friend of the family having been raised in the same neighborhood some 500 yards away and that he wanted Mrs. Johnson to feel that justice had been done. (TE, pp. 33-34). He then testified that he could have requested assistance from the Attorney General's Office or another Commonwealth Attorney. (TE, p. 35). However, because of the circumstances of this case and the emotional condition of Mrs. Johnson, he felt it was proper to allow Mr. Burns to assist in the case. (TE, p. 35). He then testified that due to the fact in the prior two weeks to trial he was sick with the flu that Mr. Burns would more than usual, conduct most of the trial. (TE, p. 38).

At the close of the testimony the trial court ruled that Mr. Burns and Mr. Scalf be allowed to assist the

prosecution thereby overruling the appellant's motion. (TE, p. 40). The court's reasoning was that such a ruling was proper for the family to feel that justice was done. (TE, p. 40).

REASONS FOR NOT GRANTING THE WRIT

A. The Opinion Below Is Based on a State Rule of Criminal Practice or Procedure That Does Not Offend Due Process.

The opinion below is based on a long standing rule of law in Kentucky that private counsel retained by persons desirous of a conviction are permitted to assist the Commonwealth Attorney in the conduct of the prosecution. *Stumbo* at 2. The opinion below is in conformity with the general practice among the states. See 63 Am. Jur. 2d Prosecuting Attorneys, §9 (1972).

Applying this long standing rule to the case at hand the Kentucky Supreme Court ruled as follows:

> "Prior to trial, the Commonwealth's Attorney, the Honorable James Allen, gave permission to Mr. Burns to assist in the prosecution of the appellant, provided that the prosecution of the case proceed according to law and that justice be done for all parties. The trial court ruled that Mr. Burns could assist in the prosecution so that the family of the deceased would feel that justice was done. Mr. Allen conducted voir dire and remained seated at counsel's table throughout the remainder of the trial while Mr. Burns prosecuted the case.
>
> It has long been the law in this jurisdiction that private counsel retained by persons desirous of a

conviction are permitted to assist the commonwealth's attorney in the conduct of the prosecution. Because the entire prosecution of the case was not turned over to private counsel, and the commonwealth's attorney was present in the courtroom during trial, we find no error in the trial court's allowing Mr. Burns to assist the commonwealth's attorney in the conduct of the prosecution of the case." *Stumbo* at 2-3.

This Court in *Carter* v. *Illinois,* 329 U. S. 173 (1946), stated:

"[T]he Due Process Clause has never been perverted so as to force upon the states a uniform code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual states. The constitution commands the states to assure fair judgment. Procedural details for securing fairness it leaves to the states. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures." *Id.* at 175.

Along these same lines, this Court in *Patterson* v. *New York,* 432 U. S. 197 (1977), stated:

"It goes without saying that preventing and dealing with crime is much more the business of the states than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states. Among other things, it is normally within the power of the state

> to regulate procedures under which its laws are carried out, . . ., and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 201-202.

Respondent submits that the state rule of criminal practice applied in this case by the Supreme Court of Kentucky in no way offends due process. Under this state rule a privately retained attorney is permitted to assist a Commonwealth Attorney in the prosecution of a case. Respondent submits that under the above-cited authorities this rule provides a criminal defendant with his constitutionally guaranteed right to a fair trial.

In the case at hand the Commonwealth Attorney had no objection to the assistance of the privately retained counsel but demanded that prosecution of the case proceed according to law and in an order that justice be done for all parties. (TE, p. 24). To this Mr. Burns, being an ex-Commonwealth Attorney himself, agreed to meet such a responsibility. (TE, p. 24). The entire prosecution of the case was not turned over to private counsel, and the Commonwealth Attorney was present in the courtroom during the trial. *Stumbo* at 4.

Respondent submits that the application of the Kentucky rule permitting privately retained counsel to assist a Commonwealth Attorney to the case at hand did not deny the petitioner due process of law. As this

Court said in *Spencer* v. *State of Texas*, 385 U. S. 554 (1967),

> "[A] state rule of law does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Id.* at 564.

B. The Opinion Below Has Not Decided a Federal Question in a Way in Conflict With Decisions of This Court or of a Federal Court of Appeals or of Another State Court of Last Resort.

Rule 17 of the Rules of this Court states that a writ of certiorari is a matter of judicial discretion and will be granted only when there are important reasons therefor. Under Rule 17 reasons that will be considered by this Court include where a state court of last resort has decided a federal question in a way in conflict with applicable decisions of this Court or with the decision of a Federal Court of Appeals, or with the decision of another state court of last resort. Respondent submits that the petitioner has failed to show this Court that the opinion below conflicts in any of the above-mentioned ways.

Respondent here reiterates its position that the opinion below is based solely on state or nonfederal grounds and that the court below did not decide a federal question.

Even if the opinion below be construed as deciding a federal question, respondent submits that the opinion below does not conflict with any decisions of this Court.

The petitioner cites in his petition two cases decided by this Court wherein the duties of a public prosecutor are set out. These cases are *Berger* v. *United States,* 295 U. S. 78 (1934) and *Donnelly* v. *DeChristoforo,* 416 U. S. 637 (1974) (dissenting opinion, Douglas, J.). Petitioner asserts that the rationale of these two cases conflicts with the opinion below. Respondent, respectfully, disagrees with this contention of the petitioner.

The duties of a public prosecutor are clear and cannot be disputed. Under the Kentucky rule of law applied by the court below these duties of the public prosecutor remain unchanged. The public prosecutor's duty to see that justice is done continues regardless of whether or not he or she is assisted by privately retained counsel. Further, the privately retained counsel in this case committed himself to seeing that justice was done. (TE, p. 24). Mrs. Goldie Johnson, who hired the private counsel in this case, testified that no promises were made to her other than that the prosecution would see that justice be done. (TE, p. 31). Respondent submits that the opinion below in no way conflicts with the decisions of this Court cited by the petitioner which detail the duties of a public prosecutor.

The respondent also desires to point out that the petitioner has not cited any decision of a federal Court of Appeals that has decided a federal question in a way in conflict with the opinion below. Respondent, itself, has been unable to find any such decision.

Further, respondent submits that the opinion below has not decided a federal question in a way in conflict

with the decisions of another state court of last resort. Again, respondent asserts that the opinion below did not decide a federal question. Even if the opinion below be construed as deciding a federal question, respondent submits that the opinion below was not decided in a way in conflict with the decision of another state court of last resort.

The petitioner cites to three jurisdictions which do not allow a private prosecutor employed by private persons to participate in the prosecution of a case. The cases cited by petitioner are *State* v. *Harrington,* 534 S. W. 2d 44 (Mo. 1976); *Biemel* v. *State,* 71 Wis. 444, 37 N. W. 244 (1888); and *McKay* v. *State,* 90 Neb. 63, 132 N. W. 741 (1911).

Each of the above-cited decisions is based on the respective court's interpretation of state statutes. In *State* v. *Harrington, supra,* the court said:

> "This Court has recognized the inherent vice and potential prejudice arising from the participation of privately retained prosecutors in the prosecution of criminal defendants, but, nevertheless, has yet to strike down a conviction because of a private prosecutor's participation. The decisions have cast the burden on the defendant to allege and prove prejudice. We have come to believe that, by reason of the public policy enunciated by the Legislature, such a burden is unwarranted.
>
> We are not unaware that in most jurisdictions private prosecutors continue to participate in public prosecutions and text authorities proclaim such practice to be the general rule." *Id.* at 49.

In *Beimel* v. *State, supra,* the court said:

> "The question for determination is whether it is in accord with the statutes and laws of the state and with public policy that the court should permit an attorney employed by and expecting compensation from private parties to appear and aid in the prosecution of a person charged with a crime punishable by imprisonment in the state prison. We think it is quite clear from the reading of our statutes on the subject, as well as upon public policy, that an attorney employed and paid by private parties should not be permitted either by the courts or by prosecuting attorneys to assist in the trial of such criminal cases." *Id.* at 247.

Finally, in *McKay* v. *State, supra,* the court in rendering its decision said:

> "In such cases it is to the interest of the state that such a county attorney should have the assistance of outside counsel; and, if there were nothing in the statute providing therefor, as was the case when Polin v. State, *supra,* was decided, we would adhere to the rule there announced; but our Legislature, by the statute under consideration, has wisely provided for just such emergencies. In doing so, however, it has not left it to outside parties to select the assistant counsel. It has imposed that duty upon the county attorney and district court, and has provided that the county attorney may, under the direction of the district court, procure such assistance." *Id.* at 745.

The above-cited cases, then, were based solely on state grounds and did not decide a federal question. If

the opinion below be construed as deciding a federal question, respondent submits, that it should not be viewed as being in conflict with state court decisions which do not decide a federal question, but merely interpret state statutes.

For the above-mentioned reasons respondent submits that the petitioner has not shown this case to fall within the character of reasons enumerated in Rule 17 of the Rules of this Court.

C. The Opinion Below Is Based Upon an Analysis of the Particular Facts Involved.

As to the alleged improper conduct on the part of the privately retained counsel in this case, the court below said:

> "After considering this issue against the background of the entire case, we conclude that the misconduct in question did not produce that level of prejudice to the appellant which requires reversal." *Stumbo* at 6.

This portion of the decision of the court below turned solely upon an analysis of the particular evidence introduced and the facts involved in the trial of this case. The Supreme Court does not grant certiorari to review evidence and discuss specific facts. *United States* v. *Johnston,* 268 U. S. 220 (1925). Respondent, submits, then that this issue is not properly before this Court.

D. There Are No Special or Important Reasons for Granting Certiorari in This Case.

Rule 17 of the Rules of this Court state that certiorari will be granted only where there are special and important reasons therefore.

In support of his contention that certiorari should be granted petitioner cites *In re Murchison,* 349 U. S. 133 (1955) and *Tumey* v. *Ohio,* 273 U. S. 510 (1927). Respondent submits that these cases should not be considered as authority in this case as they were concerned with factual situations that are far removed from the case at hand.

Respondent submits that the petitioner has failed to state any special or important reasons for granting the writ of certiorari. Respondent further submits that the issues in this case, while important to the parties involved, are not sufficiently important to the public interest to grant the writ of certiorari.

CONCLUSION

For the foregoing reasons respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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